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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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WEST TEXAS TRANSMISSION, L.P., PETITIONER

v.

ENRON CORP., ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT*

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**BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION**

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### **QUESTION PRESENTED**

Whether the district court erred in denying petitioner's claim for specific performance, under its contractual right of first refusal, to purchase respondent Enron Corporation's interest in a natural gas pipeline.



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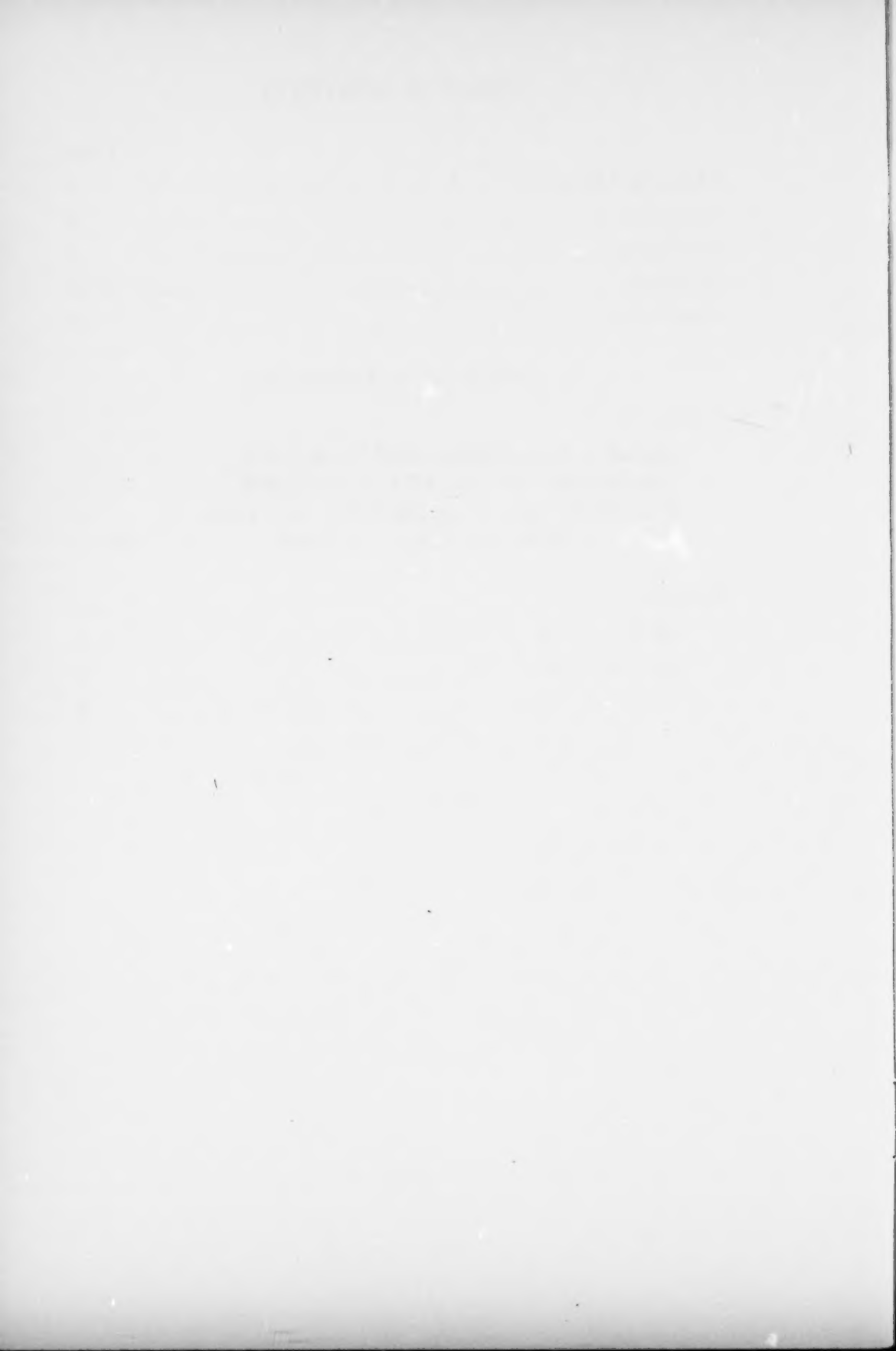
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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 907 F.2d 1554. The district court's findings of fact and conclusions of law (Pet. App. 33a-54a) are unreported.

## **JURISDICTION**

The judgment of the court of appeals was entered on August 9, 1990. A petition for rehearing was denied on September 17, 1990. Pet. App. 31a-32.<sup>1</sup> The petition for a writ of certiorari was filed on December 17, 1990. The jurisdiction of the court is invoked under 228 U.S.C. 1254(1).

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<sup>1</sup> The court of appeals treated petitioner's suggestion of rehearing en banc also as a petition for rehearing. Pet. App. 31a-32a.

## STATEMENT

1. In 1969, petitioner built the TransTexas Natural Gas Pipeline to carry natural gas from production areas in the Texas Permian Basin to New Braunfels, Texas, where a network of pipelines serves the Texas Gulf Coast.<sup>2</sup> In 1985, petitioner sold a 50% undivided interest in that pipeline to respondent Enron Corporation, Inc., thereby creating a joint venture to transport and sell natural gas to the Texas Gulf Coast area.<sup>3</sup> Pet. App. 2a, 38a-39a. Under the terms of the contract of sale, petitioner and Enron agreed that should either party decide to sell its interest in the pipeline, the other would have a "right[ ] of first refusal" to purchase that interest "on the same terms and conditions" set forth in any third party offer acceptable to the seller. *Id.* at 15a, 16a (Ownership Agreement, Art. IX, § 9.1).

Shortly thereafter, Enron announced an agreement to acquire Houston Natural Gas Corporation (HNG), which owned a 50% interest in a competing pipeline. The Federal Trade Commission initiated an antitrust investigation of Enron's proposed acquisition of HNG. Pet. App. 3a-4a, 39a; see 15 U.S.C. 18 and 45. In June 1985, the Commission provisionally accepted a proposed consent order with Enron and HNG. Pet. App. 39a-40a. That proposed order called for Enron to divest its interest in the TransTexas Pipeline, *id.* at 71a, and provided that the Commission must approve Enron's sale of that interest in order to "ensure the continuation of the assets as ongoing, viable enterprises engaged in the same business in which the Properties

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<sup>2</sup> Valero Transmission Company, petitioner's predecessor in interest, built the pipeline. For convenience, we refer to Valero as petitioner.

<sup>3</sup> NorTex, a wholly owned subsidiary of InterNorth, Inc., Enron's predecessor in interest, bought the interest in petitioner's pipeline. For convenience, we refer to NorTex and InterNorth collectively as Enron.

are presently employed and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint," *id.* at 66a.<sup>4</sup>

2. As a result of the Commission's consent order, Enron sought buyers for its interest in the TransTexas Pipeline. In January 1988, Enron agreed to sell its interest to respondent Teco Pipeline Company, and therefore submitted the proposed contract for the Commission's approval. Enron also notified petitioner of the proposed Teco contract. Petitioner, as an owner of the pipeline, exercised its right of first refusal in March 1988, by signing a contract that was a copy of the Enron/Teco contract with interlineated revisions to reflect petitioner as the purchaser. Petitioner's contract with Enron included the condition that the sale be subject to approval by the Commission under the terms of the Commission's previously entered final order (see note 4, *supra*). Pet. App. 7a-9a, 42a.<sup>5</sup> As

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<sup>4</sup> After publication and expiration of the public comment period, the proposed consent order became the Commission's final decision in September 1985. Pet. App. 55a-71a; *In re InterNorth, Inc.*, 106 F.T.C. 312 (1985) (Dkt. C-3168). Petitioner did not object to or comment on the proposed order. As the district court found, petitioner "had actual notice of the terms of the proposed Consent Order, including the requirement that Enron divest its interest in the Trans-Texas Pipeline and that the divestiture be made to a purchaser approved by the FTC." Pet. App. 40a.

<sup>5</sup> Section 1.07 of the Enron/petitioner contract provided as follows:

*Seller's Conditions to Closing.* The obligations of Seller to proceed with the closing are subject, at the option of the Seller, to the satisfaction of the conditions that . . . (iii) all approvals relating to the Federal Trade Commission Decision and Order re InterNorth, Inc. (Docket C-3168) issued September 30, 1985, insofar as it relates to the System (as defined in this Agreement) shall have been obtained.



a result, Enron asked the Commission for approval to divest its pipeline interest to petitioner under the terms of the contract. *Id.* at 42a.<sup>6</sup>

In May 1988, the Commission denied Enron's application to divest its pipeline interest to petitioner. Pet. App. 72a-74a. Despite petitioner's efforts to persuade the Commission otherwise, the Commission determined that

[d]ivestiture of Enron's TransTexas interest to [petitioner] would not achieve an adequate lessening of concentration among pipeline companies moving gas out of the Permian Basin. In addition, divestiture of Enron's TransTexas interest to [petitioner] would increase the already high concentration levels among pipeline companies able to economically supply natural gas to the San Antonio area.

*Id.* at 73a. The Commission therefore concluded, "based upon the record in this case, that divestiture \* \* \* to [petitioner] would not likely satisfy the remedial purposes of the [final consent order]." *Ibid.* On the other hand, the Commission approved Enron's contract with Teco, concluding that "divestiture to Teco, a new entrant, will help achieve the remedial goals of the Commission's [final consent] order." *Ibid.*

Pet. App. 7a-8a. Section 1.09 of the contract similarly provided as follows:

*Termination.* This Agreement shall terminate automatically (i) if the FTC disapproves or rejects Seller's divestiture of Company to Buyer \* \* \*.

*Id.* at 8a.

<sup>6</sup> A similar pair of Enron/Teco and Enron/petitioner contracts (the latter also the result of petitioner's exercising its right of first refusal and matching an earlier Teco contract) had been submitted to the Commission in 1987. These contracts, however, had expired by their terms before the Commission acted upon Enron's request that they be approved. Pet. App. 6a-7a, 41a-42a.

3. In June 1988, petitioner asked the Commission "to rescind its disapproval of [petitioner] as a divestee or, in the alternative, to reopen the consent order proceeding."

Pet. App. 44a. Petitioner principally contended that the Commission lacked authority to approve or disapprove [petitioner] as a purchaser of Enron's interest in the pipeline in the absence of evidence and a finding that the acquisition by [petitioner] would violate Section 7 of the Clayton Act.

*Id.* at 45a; see *id.* at 11a.

In August 1988, the Commission rejected petitioner's request for relief. See Pet. App. 45a-47a. As the court of appeals summarized the Commission's reasoning:

First, [petitioner] had notice of the consent decree and many opportunities to present its objections to the FTC before the FTC finalized its order. \* \* \* Second, [petitioner] failed to present its objections in a timely fashion to the FTC during the approval process for either the first or the second purchase contract, again waiving those arguments.

Third, the FTC's actions did not impinge upon [petitioner's] right of first refusal. [Petitioner] exercised that right twice, signing two different purchase agreements which expressly conditioned [petitioner's] reacquisition of the pipeline on FTC approval. Fourth, sale of the pipeline to [petitioner] would not achieve the remedial purposes of the consent decree to eliminate the lessening of competition in the Permian basin area.

*Id.* at 12a.<sup>7</sup>

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<sup>a</sup> In addition, the Commission cited factor not previously considered during the earlier administrative proceedings:

[Petitioner] had disclosed its immediate intention to resell the pipeline. Since the FTC could not monitor this resale [petitioner's]

4. In the meantime, in late May 1988, petitioner had filed an action against Enron in Texas state court. Petitioner sought specific performance of its contractual right of first refusal to require Enron to sell its pipeline interest to petitioner. On June 9, the state court temporarily enjoined Enron from selling its pipeline interest to Teco. Pet. App. 12a-13a, 44a.

On June 24, Enron removed the state court action to the United States District Court for the Western District of Texas.\* After the Commission denied petitioner's request for relief, petitioner amended its complaint and added the Commission as a party defendant, alleging that the "Commission's action in denying approval of [petitioner] as a divestee under the consent order was arbitrary and capricious and not in accord with the law and constitutes a violation of [petitioner's] constitutional rights." Pet. App. 47a.

5. In December 1988, after a bench trial, the district court rejected petitioner's claims and accordingly dissolved the temporary injunction. Pet. App. 33a-54a. Turning to petitioner's claim for specific performance, the court found that petitioner "expressly agreed in Section 1.07 of the Stock Purchase Agreement that its purchase was subject to FTC approval. \* \* \* Accordingly, the contract by which [petitioner] exercised its right of first refusal expressly conditions [petitioner's] purchase on FTC approval." *Id.* at 49a. That condition, the court determined, "has not been satisfied, and as a result, Enron is under no contractual obligation to sell its interest in the pipeline to [petitioner]." *Ibid.* The court therefore held

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reacquisition of the pipeline could undermine the consent decree's purposes to increase competition, and to ensure the continuation of the assets as ongoing, viable enterprises.

Pet. App. 12a.

\* The temporary injunction issued by the state court remained in effect under 28 U.S.C. 1450. Pet. App. 47a.

that "Enron did not breach the contract by which [petitioner] could exercise its right of first refusal." *Ibid.*

The court also concluded that the Commission's "action in disapproving Enron's selling its pipeline interest to [petitioner] does not constitute a taking of [petitioner's] property." Pet. App. 51a.<sup>9</sup> The court pointed out that petitioner's

rights of first refusal gives [petitioner] nothing more than the right to match a third party's good faith offer to purchase Enron's pipeline interest. The FTC's action has not impaired that right[; petitioner] was free to match, and did match, Teco's good faith offer.

*Id.* at 51a-52a. Moreover, the court concluded that "there has been no taking of [petitioner's] property because the FTC's action in Docket C-3168 did not constitute an adjudication of [petitioner's] contract rights." *Id.* at 52a. As the court stated, petitioner "remains free to assert against Enron whatever legal rights it may have under the terms and conditions of the Ownership Agreement." *Ibid.*

6. In September 1990, the court of appeals affirmed. Pet. App. 1a-30a.<sup>10</sup> In the court of appeals, petitioner contended that "by insisting on FTC approval as a prerequisite to the agreement, Enron created an untenable dilemma \* \* \* [that] effectively gutted [petitioner's] preemptive rights." *Id.* at 14a. The court stated that where, as here, the contract creating the preemptive right of first refusal requires that the rightholder match "the same

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<sup>9</sup> The court also rejected petitioner's contention that the Commission's disapproval of its acquisition of Enron's pipeline interest was arbitrary and capricious. Pet. App. 53a-54a. Petitioner sought no further review of that claim.

<sup>10</sup> Before petitioner's notice of appeal was filed with the Fifth Circuit (and in the absence of an injunction pending appeal), Enron closed its contract with Teco and sold its pipeline interest. See FTC C.A. Br. 10; Enron C.A. Br. 5; Teco C.A. Br. 3.

terms and conditions as set forth in [a third party] offer or agreement to purchase, *id.* at 16a (quoting 1985 Ownership Agreement), petitioner—as the rightholder—must match all conditions “as long as those conditions are commercially reasonable, imposed in good faith, and not specifically designed to defeat the preemptive rights,” *id.* at 17a (citations omitted).

The court of appeals upheld the district court’s finding—not challenged by petitioner—that “Enron and Teco included the approval term in good faith, without subterfuge or collusion, and without an ulterior motive to override [petitioner’s] right of first refusal.” Pet. App. 18a. The court also determined that “the approval requirement is commercially reasonable,” noting that “business venturers routinely subject their contracts to outside approval for financing or credit-worthiness in order to guarantee the financial success of venture.” *Ibid.* (citations omitted). Accordingly, the court held that “Enron did not violate [petitioner’s] right of first refusal by incorporating the FTC approval term into the TECO purchase agreement.” *Id.* at 19a.

Moreover, the court of appeals rejected petitioner’s contention that it “could exercise its right of first refusal without matching [the FTC approval] term.” Pet. App. 19a. The court concluded that

the comprehensive purchase contract between Enron and TECO contains many relevant terms \* \* \*. [Petitioner’s] preemptive right requires [petitioner] to meet all [the] relevant terms and conditions.

*Id.* at 20a. The court also determined that the approval term was “a material term” of the contract, “since any attempt by [petitioner] to accept the TECO contract without the FTC approval term would substantially vary the terms of the sales agreement.” *Id.* at 21a. Having concluded that no principle of contract law excused petitioner’s compli-

ance with the approval term, the court held that petitioner "was required to meet all the terms and conditions of the TECO contract, including the FTC approval term." *Id.* at 25a.

In sum, the court of appeals held that petitioner's right of first refusal required it to accept [the FTC approval] term in order to exercise its preemptive right. [Petitioner] did indeed accept this term when it executed the TECO contract. When [petitioner] failed to meet this condition, Enron was no longer obliged to reconvey the pipeline to [petitioner].

*Id.* at 26a-27a.

Turning to petitioner's claims against the Commission, the court rejected its contention that the Commission "manipulated [petitioner's] pre-existing contract rights by requiring Enron to receive its approval before selling the pipeline to [petitioner]." Pet, App. 27a. As the court explained:

[T]he conditions under which [petitioner] may exercise its right of first refusal materialize after Enron receives a valid offer from an independent third party. [Petitioner] may not dictate the terms and conditions of its purchase agreement. Although [petitioner's] right of first refusal arose before the consent decree, the third-party contract containing the approval term was finalized *after* Enron entered into the consent decree. [Petitioner's] right of first refusal required it to match the terms in this subsequent contract, including that of FTC approval.

*Id.* at 28a. In these circumstances, the court determined, the Commission "did not manipulate the consent decree impermissibly to reach a third party. Rather, the interaction between the consent decree and [petitioner's] right of first refusal subjected [petitioner] to FTC authority." *Ibid.*



Finally, the court concluded that petitioner erred in relying on *Martin v. Wilks*, 109 S. Ct. 2180 (1989).<sup>11</sup> “Unlike the decree in *Martin*,” the court noted, “the consent decree between the FTC and Enron does not directly bind [petitioner].” Pet. App. 29a. To the contrary, petitioner “must submit its acceptance to the FTC for approval because its *right of first refusal* requires [petitioner] to meet the terms and conditions of a third party offer.” *Id.* at 29a-30a. The court therefore recognized that “it is the Ownership Agreement and not the consent decree which binds [petitioner].” *Ibid.*

#### ARGUMENT

Petitioner contends (Pet. 5-9) that the courts below, in denying its contractual claim for specific performance to purchase a pipeline based on the Federal Trade Commission’s consent order entered against third parties, violated the principle recently articulated in *Martin v. Wilks*, 109 S. Ct. at 2183, namely, “that a person cannot be deprived of his legal rights in a proceeding to which he is not a party.” As the previously detailed background of this litigation shows, petitioner’s contention is without merit. Neither the district court nor the court of appeals suggested—much less held—that the Commission’s consent order involving Enron and HNG bound petitioner or otherwise stripped the firm of its contractual right of first refusal. To the contrary, the courts below correctly recognized that the consent order did not modify petitioner’s contract right, and that Enron fully honored and

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<sup>11</sup> In *Martin v. Wilks*, this Court held that “[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.” 109 S. Ct. at 2186.

complied with petitioner's right of first refusal. As the court of appeals succinctly explained:

Unlike the decree in *Martin*, \* \* \* the consent decree between the FTC and Enron does not directly bind [petitioner]. Rather, [petitioner] must submit its acceptance to the FTC for approval because its *right of first refusal* requires [petitioner] to meet the terms and conditions of a third party offer. One of conditions happens to be FTC approval. Enron is bound by the consent decree to include that FTC approval term in any purchase agreement. [Petitioner] is bound by the terms of its preemptive right to accept that term. Therefore, it is the Ownership Agreement and not the consent decree which binds [petitioner].

Pet. App. 29a-30a.<sup>12</sup> Accordingly, the decision below is consistent with decisions such as *Martin v. Wilks, supra*, and otherwise warrants no further review.

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Petitioner asserts in passing (Pet. 7) that the Commission approval term may not qualify its right of first refusal. The court of appeals, after canvassing applicable state contract law, rejected that claim. See Pet. App. 17a-25a. Petitioner offers no sound reason for this Court to depart from its practice of declining to review such a state law issue. See *Turner v. United States*, 440 U.S. 48, 58 (1979); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).



**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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